

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE CAM FERENBACH, MAGISTRATE JUDGE
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ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, :
Plaintiffs, : No. 2:10-cv-106-LRH-VCF
-vs- : January 22, 2020
RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual, : Las Vegas, Nevada
Defendants. :
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TRANSCRIPT OF STATUS CONFERENCE

APPEARANCES:

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(Appearances continued on Page 2.)

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1 LAS VEGAS, NEVADA, WEDNESDAY, JANUARY 22, 2020, 1:00 P.M.

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3 THE CLERK: Oracle USA, Inc., et al., versus
4 Rimini Street, et al., 2:10-civil-106-LRH-VCF.

5 This is before the Court on motions in dockets
6 1290, 1291, 1292, 1296 and 1301. Counsel make your
7 appearance, please.

8 MR. POCKER: Your Honor, Richard Pocker, Boies,
9 Schiller & Flexner, on behalf of the Oracle parties.

10 THE COURT: Mr. Pocker.

11 MS. SHINN: Lindsey Shinn from Morgan, Lewis &
12 Bockius on behalf of Oracle USA, Inc., Oracle America, Inc.,
13 and Oracle International Corporation.

14 THE COURT: Thank you, Ms. Shinn.

15 MS. SMITH: Good afternoon, your Honor. Sharon
16 Smith on behalf of the Oracle entities.

17 THE COURT: Ms. Smith.

18 MR. POLITICO: Your Honor, John Polito on behalf
19 of plaintiffs Oracle.

20 THE COURT: All right, Mr. Polito. Okay.

21 MR. VANDEVELDE: Good afternoon, your Honor.
22 Eric Vandevelde on behalf of Rimini Street.

23 THE COURT: Mr. Vandevelde.

24 MR. McCACKEN: Good afternoon, your Honor,
25 Casey McCracken, from Gibson, Dunn & Crutcher on behalf of

1 Rimini Street.

2 THE COURT: Mr. McCracken.

3 MR. ALLEN: And Mr. West Allen on behalf of the
4 Rimini parties, your Honor.

5 THE COURT: All right. Thank you, Mr. Allen.

6 Did we have anybody on the phone for this one?
7 I guess not.

8 MR. MAROULIS: Yes, your Honor. This is James
9 Maroulis from Oracle for the Oracle entities.

10 THE COURT: Okay. Let's see. I'm sorry, could
11 you say your name again, sir?

12 MR. MAROULIS: I'm sorry, your Honor. It's
13 James Maroulis from Oracle for the Oracle entities.

14 THE COURT: James Maroulis. Okay. Great.
15 Thank you very much.

16 So the motions 1291, 96 and 1301 are the motions
17 to seal. I've looked at those, that I find there's good
18 cause. This is not a dispositive matter so I'm going to order
19 those all be granted, the documents will be sealed.

20 And then, actually, 1292 is the sealed version
21 of 1290 which is redacted. So I'm just going to -- I
22 guess I'm just going to argue 1292, which is the unredacted
23 version, and I'll grant that one, and just take the gavel off
24 1290. And I'll rule -- let me say I'll rule on it, and we'll
25 take the gavel off the other one after I rule.

1 All right. Now, fact discovery closed on the
2 17th, so I had a question just first, if I can hear from both
3 sides, other than the items that we're going to argue today,
4 is everything else that, you know, is contemplated?

5 I went back and looked at the various orders I
6 entered over the last few -- I guess there was the -- I think
7 the operative ones were 1232 was the post objection discovery
8 scheduling order, and then that was in June.

9 And then in September, after we had a hearing,
10 the parties got together and wrote up the more detailed order
11 that had to do with allocating the costs and all that, and
12 then -- and then I entered minute orders on the 20th setting
13 some dates, and one of those dates is the one I just
14 referenced.

15 So is everything done under those orders, you
16 know, as they evolved except for what we're going to talk
17 about that's spelled out in this motion today?

18 MR. VANDEVELDE: I believe so, your Honor.

19 THE COURT: Oh, good.

20 MR. VANDEVELDE: Expert discovery begins in a
21 couple of weeks, on the 31st.

22 THE COURT: Right. We've got a cutoff for that,
23 yeah.

24 MR. POCKER: And, your Honor, nothing is
25 pending, obviously. Since discovery just closed on

1 January 17th, it's foreseeable that if we're reviewing
2 discovery, if some issue comes up, we would seek leave from
3 you to either entertain that motion or not.

4 And you've heard us reference in sketchy detail
5 at the time, because it's still under analysis, but there may
6 be a possible request for spoliation sanctions as well in
7 connection with this.

8 THE COURT: Yeah, that would be down the road.

9 I'm not trying to, you know, cut you off.
10 Just -- it sounds to me -- of course, you can't predict the
11 future how I'm going to rule on this motion, and as things get
12 produced, something might happen.

13 But as things stand now and what's known,
14 setting aside this possible spoliation which you reserve that,
15 everything else seems to be completed?

16 MR. POCKER: The Rule 30(b) (6) deposition has
17 been completed.

18 THE COURT: Yeah, that and -- okay. Great.
19 Well, that's helpful.

20 All right. So as I understand it, the motion to
21 compel addressed three requests for production, 9, 11, and 14,
22 and interrogatory number 5.

23 And I think the things that are sought to be
24 produced is -- let's see, a complete list of updates and other
25 materials actually delivered to customers, then whitepapers,

1 webinars and other things, and manuals available on Rimini's
2 website, and then documents relating to the Oracle software
3 and support materials used to create those first two things,
4 and then the draft Dev Instructions.

5 So is that pretty much the universe of what
6 we're going to talk about?

7 MR. VANDEVELDE: Yes, your Honor. It may make
8 sense to kind of address those three issues separately.

9 THE COURT: Right. Okay. Well, I'm fine. I
10 just wanted to make sure I kind of had a point context.

11 So, okay. So we're ready to go. It's Oracle's
12 motion so who is going to argue?

13 MR. POCKER: Your Honor, Ms. Shinn and Ms. Smith
14 will be arguing different parts. Mr. Vandeveld has indicated
15 it's really --

16 THE COURT: Okay. Well, have you guys discussed
17 which ones you want to talk about first, or do you have an
18 idea which one you want to talk about first?

19 MR. VANDEVELDE: I'm happy to start wherever,
20 your Honor.

21 THE COURT: Okay. Wherever? Okay.

22 MS. SHINN: We're happy to go in order, your
23 Honor.

24 THE COURT: Okay, so, Ms. Shinn. You're up.
25 Thank you.

1 MS. SHINN: Good afternoon, your Honor.

2 I'll be primarily addressing interrogatories --
3 interrogatory number 5 and RFP number 11, and my cocounsel,
4 Sharon Smith, will be primarily addressing the draft up
5 instructions under RFPs 9 and 14.

6 THE COURT: Okay. So the draft Dev are under 9
7 and 14, the RFP, and then interrogatory 5 and 11 has to do
8 with what you're doing. Okay. Good.

9 MS. SHINN: Yes, and one other point of
10 clarification, you mentioned that the documents that we're
11 seeking that were used in creation of other materials is
12 limited to RFP 11 and our Rog 5, which I'll speak about in
13 more detail shortly, we're seeking a list of the materials
14 that were delivered to customers.

15 THE COURT: List of materials, right. But
16 that's under the interrogatory or the request?

17 MS. SHINN: Yes, that's under interrogatory
18 number 5.

19 THE COURT: Okay.

20 MS. SHINN: But just to start off and kind of
21 give you a bigger picture overview, the injunction places
22 restrictions on Rimini's support processes for developing and
23 testing software updates and for the creation of documents and
24 support materials, (unintelligible) goal that was entitled to
25 discovery to test whether Rimini's processes are in compliance

1 with the injunction.

2 Now, Rimini admits that the injunction restricts
3 the manner in which that -- in which it provides the support,
4 and that means that Oracle is entitled to discovery, not just
5 regarding the final deliverables that Rimini delivers to
6 customers, but discovery into the processes and the manner in
7 which they create those final deliverables before they're
8 actually delivered to customers.

9 And as I mentioned, I'll be addressing
10 interrogatory number 5 which is information about the updates
11 and fixes and deliverables that Rimini in fact gave to
12 customers.

13 And RFP 11 seeks information about documents, as
14 you mentioned, made available on Rimini's website and the
15 documents that were used -- the Oracle documents that were
16 used to create those updates.

17 For both of these, Rimini has superior access
18 to, and knowledge of, the records that contain this
19 information, superior to Oracle, that is, and that's why we
20 believe that they should produce these documents.

21 As to Rog 5, Rimini is under injunction that
22 covers what it sends to customers, and so Rog 5 seeks a list
23 of what Rimini sent to its customers so that Oracle can assess
24 whether or not they're in compliance.

25 Rimini knows what it sends to customers, that's

1 its business. It provides support to customers in the guise
2 of tax and regulatory updates, break fixes, new functionality,
3 the kinds of items referenced in the full scope of
4 interrogatory number 5.

5 But that's their business. They have to be able
6 to tell what they've sent to their customers, and all we're
7 asking them to do is that they tell us.

8 In the ordinary case, Rimini would keep copies
9 of the files that it sends to customers, and we asked them in
10 2019 to do that as part of this postinjunction discovery, but
11 they refused. So now we're just seeking the list of what they
12 provided.

13 The list as it stands now is deficient in two
14 ways as you would have seen in our briefing. The first is
15 that they provided information on the updates they've provided
16 to customers, but those updates, as they're referenced, are
17 Rimini-created ID numbers and don't contain the names of the
18 actual files that they send to customers, and that's the
19 information that we're looking for there.

20 They also don't contain the version information.

21 THE COURT: Well, I'll ask you -- when you say
22 they're Rimini-created ID numbers, are those created as part
23 of discovery or in the ordinary course?

24 MS. SHINN: In the ordinary course of business
25 they create -- you know, they have numbers that refer to the

1 fixes that they're implementing or sort of higher level
2 release bundle numbers that will then bundle a few of those
3 release update numbers, and then the files that they're
4 actually sending to customers fall under those organizational
5 numbers beneath them.

6 THE COURT: Okay.

7 MS. SHINN: And, as I mentioned at the outset,
8 the parties don't have equal access to the tools and
9 information that contains this information.

10 Rimini's declarant mentions that there are a
11 number of disparate systems and applications that have this
12 information. We don't have access to those.

13 We do have access to -- online access only to
14 JIRA, Rimini's development processing, development processing
15 tracking software, sorry, called JIRA, but our access to that
16 system is limited, and we can't do the same queries on the
17 back-end databases that track the underlying information.

18 Rimini's declarant also doesn't state
19 specifically that they don't track file names and version
20 information, and, in fact, we know that they do because the
21 client delivery documents that Rimini says that we should use
22 contains that information. But the client delivery documents
23 that contain that information aren't generated manually by
24 Rimini, they're generated with an automated process.

25 Rimini has tools that can parse the data in

1 their various databases to create those client delivery
2 documents, and all we're asking is that they use those same
3 tools and databases at their disposal to provide us the list
4 of the files under each of those updates without resulting --
5 resorting to the client delivery documents.

6 And the problem with the client delivery
7 documents is that they are large .pdf files. They are OCRed
8 so we don't have the benefit of native text to search those
9 documents. They are often dozens of pages long. Many of
10 those pages contain texts that aren't pertinent to
11 interrogatory number 5.

12 THE COURT: Well, but hold on. They're OCRed,
13 that means they're searchable, right?

14 MS. SHINN: OCR can -- OCR can introduce errors
15 into the documents, and especially in a highly technical
16 document, you know, certain searches may not come through
17 if --

18 THE COURT: I guess it shows my computer
19 naivete, because I always thought if you wanted to search
20 something, you wanted to have it in .pdf. But you're saying
21 it's better to have something when it's not in .pdf. How are
22 you going to search it?

23 MS. SHINN: Well, we would prefer to have Rimini
24 provide the update information, the file names in the format
25 that they've been providing the other portions of the update

1 but with a column with the file name included.

2 THE COURT: Oh, okay.

3 MS. SHINN: And the other problem with the
4 client delivery documents is that Rimini won't even represent
5 that they're the official record of what files were sent to
6 customers. Their interrogatory response just says that those
7 client delivery documents are perhaps the best source of
8 information for what has been delivered to customers.

9 And their invitation for us to go back and
10 cross-check the JIRA documentation and others, when, for
11 example, we have this limited access, is a much larger burden
12 on Oracle than it is for Rimini to simply, you know, search
13 over their databases of information that they have.

14 And they can clearly export this kind of
15 information because the export does go into the client
16 delivery documents eventually but mixed in with all that other
17 material.

18 THE COURT: Okay.

19 MS. SHINN: If you don't have questions about
20 Rog 5, I can turn to RFP 11.

21 THE COURT: You know what, let's do Rog 5 first
22 because I've got to tell you, it's hard -- that's the --

23 MS. SHINN: Sure.

24 THE COURT: Let's let Mr. Vandevelde come back
25 to Rog 5, and then you can come back on RFP 11.

1 MS. SHINN: Okay. Sounds good. Thank you.

2 THE COURT: Mr. Vandevelde, I assume it's you?

3 MR. VANDEVELDE: Yeah, I think that makes sense,
4 your Honor.

5 Let me start by just providing a little bit of
6 background so I think we're on the same page of what's
7 actually happening.

8 The rog, Rog 5, what it's asking for is a
9 summary chart, you can imagine a spreadsheet with certain
10 columns, and they want for each update -- which is somewhat of
11 an ambiguous term -- each update, the, quote, names of files
12 provided to each customer along with product line, product,
13 version information, et cetera.

14 The context I want to provide, though, is that
15 Rimini doesn't provide updates as if they're some fixed set of
16 files for every customer.

17 We're essentially consultants, right? We
18 actually go into each client's environment, first we go into
19 client A, we implement it, go into client B and implement and
20 update, go into client C. We're essentially consultants.
21 Sometimes it's to fix bugs, sometimes it's to make a
22 configuration change, sometimes it's to develop and implement
23 new code, it can be all sorts of things.

24 And it --

25 THE COURT: So let me ask this. So sometimes

1 it's something you initiate and sometimes it's something a
2 customer requests?

3 MR. VANDEVELDE: Yeah, it could be some
4 customer, a client could call Rimini and say, "We're having an
5 issue, can you come look at it."

6 THE COURT: Right.

7 MR. VANDEVELDE: Sometimes we know, for example,
8 a state tax change has happened, and it's going to affect a
9 certain set of customers, and so we proactively will implement
10 that functionality for each of the customers A, B, C, D, and
11 et cetera that are within that set that need --

12 THE COURT: That are using this particular
13 product.

14 MR. VANDEVELDE: Exactly.

15 So if you view us as a consultant, there are --
16 it's actually -- the reason I want to raise this is it makes
17 sense why we don't have some master tracking sheet that
18 documents everything we do with every company, every action we
19 take, every update we provide, every update we implement. It
20 just doesn't work that way.

21 And we spoke to Ms. Sheryl Arnold, she is the
22 senior manager of the Global Service Delivery Group, and she
23 has submitted a sworn declaration. We do not have the
24 information in the form that Rimini wants, and there is no way
25 to automatically generate it. That's just a fact.

1 We have asked the person most knowledgeable
2 about how these systems work, and there is no way for us to
3 generate this master chart that Rimini -- I'm sorry, that
4 Oracle wants.

5 So let me tell you what we have done. We have
6 answered --

7 THE COURT: So you're saying there's no way to
8 generate it by sending instructions to a --

9 MR. VANDEVELDE: Database.

10 THE COURT: -- a database.

11 MR. VANDEVELDE: Yes.

12 THE COURT: So you have to find some other way
13 to do it if you were going to do it.

14 MR. VANDEVELDE: It would be manual.

15 THE COURT: Manual. All right.

16 MR. VANDEVELDE: It would be manual.

17 And so what we've done is we've answered the Rog
18 5 by providing all of the underlying raw information, and then
19 we have told Oracle how to compile the information, and that's
20 a proper invocation of Rule 33(d).

21 And I'll tell you, what the key data set
22 here is, and opposing counsel referred to it, is a set of
23 documents called the client delivery documentation.

24 So when we provide and implement an update for a
25 client, at some point we are going to send that client a set

1 of files that we call the client delivery documentation, and
2 it says what the new functionality is, what the objects
3 affected are. It's technical jargon for the types of changes
4 and where they will be found in the client's system, and
5 those -- that set of client documentations which are .pdfs
6 which are OCR-able -- I know that's not a word -- but they can
7 be --

8 THE COURT: Searchable, yes.

9 MR. VANDEVELDE: -- OCRed, and they can be
10 searchable.

11 THE COURT: You know, just -- as long as we've
12 got these lawyers here, you know, you're supposed to file
13 documents with the court that's OCRed, and a lot of people
14 don't, and then I have to -- somebody has to do something, so
15 I just mention that.

16 Okay. Go ahead.

17 MR. VANDEVELDE: So we provide for each
18 implementation of an update for each client a set of client
19 delivery documentation files that details the changes, the
20 objects affected and other information about that update, and
21 that can be compiled, yes, manually into the chart that Oracle
22 wants.

23 Oracle has all the client delivery
24 documentation, they have all those .pdfs, they are searchable,
25 and they are just as capable as us of going through those

1 materials and compiling the chart that they want. We do not
2 have an automated way to generate the type of information in
3 the format that Oracle wants.

4 Now, I will say that during the deposition last
5 week one of the topics was about Rimini's systems, and the
6 question was posed to the witness what is the best way to find
7 out what work Rimini has done for a particular client, and the
8 client pointed Oracle's counsel to the client delivery
9 documentation. That is the best source of truth, so to speak,
10 for figuring out what Rimini did for each particular client
11 for each particular update.

12 Now, the ultimate source of truth obviously is
13 in each client's environment. That's where the vast majority
14 of work happens so the --

15 THE COURT: But that would involve third-party
16 discovery.

17 MR. VANDEVELDE: That would involve third-party
18 discovery which, as you may recall, and Rimini, too, that I
19 think there was 700 plus subpoenas sent to our clients in this
20 proceeding.

21 I don't know how many were in the trial phase,
22 but in the posttrial and contempt proceeding phase, they got a
23 certain limited number that your Honor authorized.

24 THE COURT: I remember I allowed --

25 MR. VANDEVELDE: But that is the ultimate truth.

1 From our records the best source of truth is the client
2 delivery documentation.

3 Now, in addition to that set of data, there's a
4 couple other tools that your Honor has probably seen in the
5 papers, one is called JIRA.

6 THE COURT: Right.

7 MR. VANDEVELDE: One is called DevTrack, one is
8 Salesforce. Those are not as reliable as a source of truth
9 because they're not designed to be a logging or a tracking
10 mechanism for the work we do in each client's environment.

11 Salesforce documents are kind of Rimini client
12 interactions. So, for example, by consulting Salesforce in
13 conjunction with the client delivery documentation, Oracle can
14 find out when we sent that documentation to each client.

15 JIRA is a development tool. Our developers use
16 it to plan out how they're going to do the work for the
17 clients that need the work to be done.

18 But it is not -- it is good as a snapshot in
19 time, but it's constantly evolving and changing because it's
20 being used by developers. It is not designed to be, and
21 cannot in most instances be, relied upon as a source of truth
22 for the information they want.

23 So, again, they can look at the client delivery
24 documentation. They have that. They can look at JIRA. They
25 have 24/7 access to that. They can look at DevTrack. They

1 have 24/7 access to it. They can look at Salesforce. We've
2 produced Salesforce. They have all the building blocks to
3 create this table, and there's no automated way for us to do
4 it.

5 And the reference to exportability and JIRA and
6 why can't -- it's not designed for that tool. It would not
7 generate a reliable chart.

8 And so we have provided everything, told them
9 how to do it, and they are equally capable of doing it
10 themselves.

11 THE COURT: Okay. I understand your position on
12 interrogatory 5.

13 Ms. Shinn, you get the last word on that one.

14 MS. SHINN: Thank you, your Honor.

15 As opposing counsel said, you know, they do work
16 for customers, and they provide them the files where they do
17 that work, and they -- what Oracle wants to know is what work
18 are they doing, what files are they providing to customers, or
19 what files they are modifying for customers.

20 All of that is relevant to the injunction
21 because that governs the manner in which Rimini can provide --

22 THE COURT: I don't think they're disputing
23 relevance.

24 MS. SHINN: I'll move on then to the next point
25 which is that, you know, opposing counsel says there's no way

1 to generate this information, but they do generate this
2 information. They have all of their databases, and they
3 generate the client delivery documents with the information
4 they have in their databases.

5 THE COURT: Well, they generate the delivery
6 documents, but they're saying to provide the kind of chart
7 that you want -- and they have an affidavit, you know, saying
8 that -- that it would have to be done manually, and --

9 MS. SHINN: Your Honor, there's no evidence in
10 the record as to where the file names or where the version
11 information is stored in those databases, and their declarant
12 doesn't say that those fields themselves are not exportable.

13 So it's not clear from the record -- the
14 original interrogatory also asks for information about which
15 developer worked on each of those. That's not addressed in
16 our briefing, and maybe that's further information, but that's
17 not information we're seeking today.

18 And so this more narrow set of information is
19 certainly information that we think -- because they're able to
20 automatically put it into the client delivery documents,
21 there's no reason they can't automatically put it into this
22 chart as well.

23 THE COURT: Okay.

24 MS. SHINN: And then, as far as, you know, what
25 source is the best source of truth for what was provided to

1 customers in this case, it would be helpful if Rimini then
2 would admit that the client delivery documents are the best
3 source of truth as far as what information it's delivered to
4 customers, and that might be one way forward if it is indeed
5 the fact that they simply can't provide this information any
6 other way.

7 THE COURT: Okay. Thank you.

8 MS. SHINN: Thank you.

9 THE COURT: You know, I mean, Rule 33(d) does
10 say,

11 "If the answer to an interrogatory may be
12 determined by examining, auditing," compelling --
13 "compiling, abstracting or summarizing the party's
14 business records...and if the burden of deriving or
15 ascertaining the answer will be substantially the
16 same for either party, the responding party may..."
17 specify "the records that must be reviewed, in
18 sufficient detail to enable the" interrogatory
19 party -- interrog -- "interrogating party to locate
20 and identify them as readily as the responding party
21 could; and giving the" interrog -- "interrogating
22 party a reasonable opportunity to examine and
23 audit...."

24 Well, these records have been given -- I'm
25 sorry, I'm ruling now so I'm not asking you a question so --

1 MS. SHINN: Can I make one more point, then,
2 your Honor?

3 THE COURT: Okay.

4 MS. SHINN: Just on that point, you know, it's
5 Oracle's position that the burden is more difficult for Oracle
6 because it would have to sift through these voluminous
7 documents that aren't in a helpful format, whereas Rimini can,
8 in fact, generate this information with the databases and
9 tools that it has at its disposal.

10 THE COURT: Well, that's what you claim, but,
11 you know, I don't -- it seems at a minimum it's disputed, and
12 you have the burden of convincing me.

13 So, anyway, based on all that, I'm going to
14 find -- and also I guess I'm telegraphing a little bit here.

15 You know, this has been going on a long time. I
16 put a lot of pressure on Rimini to do things, and both counsel
17 have worked together, and that's great, I really appreciate
18 that, and a ton of discovery has been given.

19 So I really think I have to be thinking about
20 sort of general proportionality here, too, as well as this
21 burden of balancing in 33(d).

22 So I'm going to deny the motion to compel with
23 regard to interrogatory number 5.

24 Okay. Do you want to go on with number 11,
25 or --

1 MS. SHINN: Sure.

2 THE COURT: -- the request to produce number 11?

3 MS. SHINN: Okay. So the language of the
4 injunction says that Rimini can't create documents using
5 Oracle copyrighted materials, and RFP 11 attempts to get to
6 that. It seeks information about the documentation and other
7 online materials that Rimini has made available on its website
8 and any underlying Oracle materials that he has used to create
9 those materials.

10 THE COURT: All right.

11 MS. SHINN: Their interpretation is overly
12 narrow of our RFP because that RFP has included the phrase
13 Oracle's software and support materials, and on its face that
14 term is defined to include instructional -- I'm sorry, let me
15 make sure I get the language right here -- instructional
16 documents so meaning documentation.

17 In Rimini's opposition it admits that it uses
18 publicly-available Oracle materials. The Reneke declaration
19 refers to an Oracle tool. And I'm sure I'm not pronouncing
20 the last name correctly, the Beichler declaration refers to
21 using other public sources of information.

22 THE COURT: Let me ask you this. So if they use
23 publicly-available Oracle information, is that a violation of
24 the injunction?

25 MS. SHINN: It is, your Honor. There is no

1 exception in the injunction for using publicly-available,
2 copyrighted Oracle information, and so to the extent that they
3 are doing that, which is what the RFP seeks to discover, that
4 would be forbidden under the injunction.

5 THE COURT: Okay.

6 MS. SHINN: As to the burden and
7 proportionality, the documents that are available on the
8 website should be easily retrievable by Rimini. Documents are
9 made available on websites or, you know, typically kept in a
10 file system somewhere, and it should be no trouble finding the
11 copy and producing those documents to us.

12 As to the sources of Oracle materials that
13 they're using to create those documents, Rimini's declarant
14 suggests that they didn't keep diligent records of what
15 materials they were using, but that shouldn't penalize Oracle.

16 Rimini is under an injunction not to use
17 Oracle's copyrighted materials, and it's their responsibility
18 to make sure they don't violate it.

19 We think that they need to perform a good faith
20 investigation into whether these sources are available. They
21 do have declarations from two individuals, but there is no
22 evidence they've conducted an investigation into whether other
23 members of the team that creates documents that are available
24 on their website do have that information.

25 THE COURT: Okay. Thank you.

1 MS. SHINN: Thank you.

2 THE COURT: Mr. Vandevelde.

3 MR. VANDEVELDE: Your Honor, this one is frankly
4 baffling to me.

5 The entire *Rimini I* case is about support
6 processes. In fact, Ms. Shinn, I think her first few
7 sentences today said the injunction is about support
8 processes.

9 THE COURT: Yes.

10 MR. VANDEVELDE: So why are we talking about
11 online marketing materials? It just doesn't make sense.

12 The *Rimini I* trial was about support processes.
13 The summary judgment rulings in *Rimini I* were about support
14 processes. The injunction is about support processes. That's
15 what Ms. Shinn said at the very outset of today's hearing.
16 The Ninth Circuit's opinion is about support processes.

17 Marketing materials have nothing to do with how
18 Rimini developers and engineers carry out their job to provide
19 support; nothing. This information is irrelevant.

20 And, in fact, when Oracle -- I think it was in
21 April or May last year -- came to your Honor and sought to
22 reopen discovery, there was no mention of marketing materials.

23 When your Honor asked them to identify the 5
24 things that they think Rimini is doing that violate the
25 injunction, they didn't mention marketing materials.

1 Marketing materials has nothing to do with our
2 support processes. What we put out on the Web as an
3 advertisement, or a client's success story where it's a client
4 testimonial, or a white paper, or a data sheet, these are all
5 types of marketing materials. Those have nothing to do with
6 how our engineers carry out their job to provide support.

7 I think what's telling is just a few days ago,
8 on Friday, we had our 30(b) (6) deposition. The topics were
9 quite broad. They covered virtually everything about our
10 company and its support processes. You want to know the one
11 that I think that was not in the topics?

12 THE COURT: I can guess.

13 MR. VANDEVELDE: Yes. Online marketing
14 materials. That was not a topic. If they think it's
15 relevant, they sure would have put it in their topics for
16 their one 30(b) (6) deposition.

17 On this basis alone this aspect of the motion
18 should be denied. If your Honor is -- you know, if they
19 really want the online marketing materials, those are publicly
20 available, they're downloadable.

21 They said there was a hiccup, and they had some
22 trepidation about trying to pull down a whitepaper because
23 they thought that it might be some communication to counsel,
24 and ethic rules bar -- sorry, communication to a party, a
25 represented party, and they thought they weren't allowed to

1 fill out some form that could be construed as contacting a
2 party, so we provided that one, right?

3 If they identify ones that they see that they
4 have some trepidation about ethical obligations to not contact
5 represented parties, we can provide those. But the vast
6 majority of them they can just go on our website and download
7 them if that's what they're concerned about.

8 THE COURT: Well, I guess they want the backup
9 information.

10 MR. VANDEVELDE: Well, yeah. I mean, let me go
11 there.

12 So they've taken a step further. Not only do
13 they want the irrelevant set of marketing materials which have
14 nothing, again nothing, to do with our support processes, they
15 want to know what materials, if any, anyone in the marketing
16 department who create these materials might have referenced
17 or -- I think Ms. Shinn just used the word used. I don't know
18 what that means.

19 But that undertaking is simply not possible. We
20 don't keep records of everything people read or see or hear
21 about.

22 I mean, imagine if your Honor was asked a
23 question what have you ever used when you issued this opinion.
24 Yes, there are some citations in an order, but that doesn't
25 capture everything you might have read, right? All the

1 discussions you might have had, some things you might have
2 seen.

3 And so we don't keep track. We don't have
4 cameras over our marketing personnel that track everything
5 they might have ever seen or received or heard about.

6 So we just don't have those records. So what it
7 would entail would be interviewing everyone who has ever had a
8 role in creating online marketing materials, which, again, are
9 irrelevant to support processes, and asking them what they
10 remember.

11 It's a futile, pointless exercise. That is what
12 the sworn declarations of now Ms. Beichler and Mr. Reneke say,
13 and so, on that basis, this should be denied as irrelevant and
14 pointless and unduly burdensome and not proportional.

15 THE COURT: All right. I understand your
16 position.

17 Ms. Shinn.

18 So I guess the first question is, I mean, you
19 can download the stuff that's on the website, right?

20 MS. SHINN: Yes, your Honor.

21 THE COURT: Marketing materials that are on the
22 website you can --

23 MS. SHINN: Yes, for a number of the
24 documents -- at least some of the documents on the website,
25 including the whitepaper that opposing counsel referred to,

1 the website requires you to enter some information --

2 THE COURT: Right.

3 MS. SHINN: -- before you can download the
4 material, and that -- you know, entering that information,
5 performing that interaction was something that caused concern
6 for us.

7 THE COURT: No, I understand that, but it's true
8 that when you raised that, they said, okay, well, that makes
9 sense, so we'll get it for you. So they gave you that, I
10 assume; is that right?

11 MS. SHINN: They have not actually said that --

12 THE COURT: Or they agreed --

13 MS. SHINN: -- would be perfectly acceptable for
14 us to do that. They have not said that.

15 THE COURT: So it's not acceptable?

16 MS. SHINN: They have not -- they have not said
17 that -- they have said that we have not provided authority for
18 our position --

19 THE COURT: Okay. So they're still taking the
20 position that it's irrelevant.

21 MS. SHINN: Yes.

22 THE COURT: Okay. Well, Mr. Vandevelde, I
23 thought you said something different.

24 MR. VANDEVELDE: No, we have -- they asked us
25 for that whitepaper, we gave it to them. I don't think we've

1 taken a position -- frankly, I'd have to consult with the
2 client. I don't think we have a problem with them downloading
3 and filling out some form. I would not consider that --

4 THE COURT: Okay.

5 MR. VANDEVELDE: -- contact with a represented
6 party. I can confirm that after this hearing, I mean, we'll
7 take that position.

8 But to the extent they want -- if they tell us
9 something that they have a fear about submitting that form,
10 we're happy to give it to them. We've already done so.

11 THE COURT: Okay. Well, maybe -- he says he's
12 done so. You disagree?

13 MS. SHINN: That's new information to us, your
14 Honor. So --

15 THE COURT: It's a big case.

16 MS. SHINN: Certainly.

17 But, really, I think the main point here is
18 that -- whether the documents are Rimini marketing material or
19 something else, that's really irrelevant. The question is
20 whether they're using Oracle software and support materials to
21 create that information.

22 And there are two paragraphs in the injunction
23 that would cover that. Paragraph 3, I'll just refer to
24 quickly says that,

25 "Rimini Street shall not distribute

1 PeopleSoft software or documentation or any
2 derivative works created from or with PeopleSoft
3 software or documentation."

4 And paragraph 5 similarly says --

5 THE COURT: Okay. Stop right there.

6 MS. SHINN: All right.

7 THE COURT: So you're construing derivative
8 works as including marketing material?

9 MS. SHINN: If Rimini -- if Rimini is using
10 PeopleSoft documentation in the creation of derivative works
11 or -- in the next paragraph it refers to reproducing
12 PeopleSoft documentation, those would be violations of the
13 injunction.

14 THE COURT: Right, but the argument the defense
15 is making is that marketing materials are not, you know,
16 prohibited, are not relevant.

17 MS. SHINN: It's not the marketing materials
18 itself, it's the Oracle software and support materials that
19 they're either reproducing or preparing derivative works from
20 in the creation of those marketing materials.

21 So to the extent that they've used or copied
22 from or derived information from that PeopleSoft documentation
23 to put into those materials, that's where the violation would
24 lie.

25 THE COURT: Okay. All right, anything else?

1 MS. SHINN: I would just mention that I did
2 mention the creation of documentation and support materials in
3 my opening earlier, and we do believe that this conduct does
4 fall within the ambit of the June 28th letter, and in the
5 deposition that just took place on Friday, I'll note that, we
6 did discuss PeopleSoft documentation in that deposition.

7 THE COURT: Okay. But that's not marketing
8 materials, is it?

9 MS. SHINN: Rimini's use and possession and
10 reproduction of PeopleSoft documentation.

11 THE COURT: To create marketing materials?

12 MS. SHINN: It was not specific -- without
13 having the transcript in front of me, it was -- pertained to
14 Rimini employees e-mailing each other (inaudible).

15 THE COURT: Note coming up there. If you're
16 having trouble reading it and you want to go back and talk to
17 him, that's okay.

18 MS. SHINN: If that would be --

19 THE COURT: No, I've been there. I've been
20 there.

21 (Discussion held off the record.)

22 MS. SHINN: Thank you, your Honor.

23 The final point I'll make is that in the Supreme
24 Court case of *Stewart versus Abend*, derivative works don't
25 have a subject matter limitation. The fact that these

1 marketing materials may be different from the PeopleSoft
2 documentation that may have been used to create them is of no
3 matter, that that's kind of a classic derivative work that
4 they've been turned into something else.

5 THE COURT: It would be derivative work. So --
6 all right.

7 Okay. I'm going to grant the motion to compel
8 in part only to the extent that, you know, you can download
9 from the website any marketing materials you want, you can
10 already do that, but if you have a problem downloading them
11 because of the concerns raised here or really anything else,
12 as long as -- I'm talking about only the marketing materials,
13 not all the backup stuff but the marketing materials, the
14 defendant needs to take reasonable steps to cooperate so you
15 can get the marketing materials off the website, so granted to
16 that extent.

17 Okay. So now it's time for Ms. Smith.

18 MS. SMITH: Thank you, your Honor.

19 Rimini objects to producing the draft Dev
20 Instructions first based on relevance and, second, based on an
21 assertion of the attorney-client privilege.

22 So what are Dev Instructions? The parties do
23 agree that Dev Instructions are a technical documentation, and
24 the Rimini engineers create those in order to allow other
25 developers to create the same fixes and updates for other

1 customers.

2 THE COURT: Are other developers within the
3 company, within Rimini?

4 MS. SMITH: Yes, yes.

5 THE COURT: Okay.

6 MS. SMITH: And Rimini admitted in its
7 opposition that it does view the Oracle code in the process of
8 creating these Dev Instructions, and that's important because
9 the injunction prohibits Rimini from using Oracle code for the
10 benefit of servicing multiple customers, and the Ninth Circuit
11 referred to that as cross-use, and I'm sure you're familiar
12 with that term.

13 And the injunction also prohibits Rimini from
14 hosting Oracle code on its systems, and in an example that we
15 put into evidence in this motion, it's clear that at least in
16 that one example Rimini is including copies of Oracle code in
17 this Dev Instruction draft document, and it's instructing its
18 engineers to delete that Oracle code and replace it with a
19 Rimini code.

20 And these are facts that are put in through the
21 declaration of Barbara Frederiksen-Cross that were undisputed,
22 and then in the final version of this Dev review document the
23 Oracle code is removed and there's some editorial changes made
24 to the technical documentation.

25 And so the injunction does govern Rimini's

1 development processes, not just the final documentation that's
2 used or sent to clients.

3 So Rimini's position that these draft Dev
4 Instructions are irrelevant really -- it ignores the terms of
5 the injunction that say that Rimini can't use Oracle's code or
6 use Oracle's code retained on its server for any purpose
7 including in developing these instructions.

8 THE COURT: Okay. So then you want all of the
9 drafts of the Dev --

10 MS. SMITH: Yes, your Honor, because essentially
11 it's a -- it's a -- it's evidence of how they developed the
12 instruction, yes.

13 THE COURT: Okay. All right.

14 MS. SMITH: And their second argument in
15 objecting to the production is attorney-client privilege.

16 THE COURT: Right.

17 MS. SMITH: Now, Rimini asserts a blanket
18 privilege objection. There's no privilege log, they didn't
19 redact these documents and log them. Their position is that
20 all of these drafts are put, since around June of 2019, into a
21 folder labeled For Legal Review, but all of those drafts are
22 privileged, and they support that by just the fact that
23 they're in this folder as well as an attorney declaration that
24 says that the in-house attorneys may review and may provide --
25 I'm sorry strike that.

4 THE COURT: Okay.

5 MS. SMITH: There's no specific showing by the
6 lawyer that each and every document that they're withholding
7 does contain attorney-client communications.

8 They don't make a showing at all that the
9 primary or predominant purpose for creating the document was
10 for legal advice. In fact, the evidence that we put in
11 through our expert, Barbara Frederiksen-Cross, indicates that
12 previously they put these same draft Dev Instructions in a
13 folder titled Individual Updates.

14 So on or about June of '19, they stopped calling
15 that folder that housed the drafts as Individual Updates and
16 they changed it to For Legal Review.

17 So part of their position is that by virtue of
18 putting them in there, they've become privileged because the
19 lawyers look at them, but that ignores the standard here which
20 they haven't even attempted to show.

21 They do admit that these drafts are used by the
22 engineers, they have a business purpose, and they think that
23 that's really undisputed in the record.

24 I think, your Honor, just based on the fact that
25 there's been no individual showing, no privilege log as each

1 of the documents could order that they be produced, but I
2 think also, if you look at the documents, and we have examples
3 in Exhibits 1 and 2, and Exhibit 3 to Barbara
4 Frederickson-Cross's declaration is a comparison of Exhibits 1
5 and 2, and those are the drafts and finals of these Dev
6 Instructions.

7 THE COURT: Hold on a minute. This would be --
8 is this in your motion?

9 MS. SMITH: In the motion.

10 THE COURT: Okay. So it would be 1290, and then
11 which -- 1290 dash what? I hope you have the document number.

12 MS. SMITH: Let's see if I have. I hope it's
13 the first one, the Frederiksen --

14 THE COURT: Declaration of Barbara Ann
15 Frederiksen-Cross, that's dash one, right, 6-page declaration?

16 MS. SMITH: Yes, that is it.

17 THE COURT: And then there are exhibits attached
18 to it.

19 MS. SMITH: Yes. Exhibit 1 --

20 THE COURT: Exhibit 1. Okay. Exhibit 1 would
21 be attachment 2 on the docket, and I'm looking at it now. It
22 says Rimini documents Bates number RSI-1 -- RSI006953654, is
23 that the one we're talking about?

24 MS. SMITH: Yes.

25 THE COURT: Both filed under seal. I thought I

1 was looking at the sealed. Hold on. I was looking at the
2 wrong one.

3 Okay. Hold on a second. All right. Oh, my
4 gosh. So this says create updates folder has been run for HCM
5 20075, is that the one you're talking about?

6 MS. SMITH: Yes, and that is the final version
7 of this Dev Instruction.

8 THE COURT: All right.

9 MS. SMITH: Exhibit 2 --

10 THE COURT: Okay. Hang on.

11 MS. SMITH: -- to her declaration is the draft
12 version, and Exhibit 3 is a comparison between the two so you
13 can see what changes were made.

14 THE COURT: Okay. So let me -- I'll pull up
15 Exhibit 3.

16 Okay. This is -- just for the record is -- it's
17 document number 1294-4, I believe. Hold on. It covers up the
18 page. Actually, 1294-4, yeah, so it starts out with Araxis
19 Merge File Comparison Report.

20 MS. SMITH: Yes, and under Comparison Detail,
21 your Honor, I think is where you can see a side-by-side of
22 the --

23 THE COURT: Comparative detail, number 5, okay.

24 MS. SMITH: Yes, of the draft and the final.

25 I mean, the first thing to note is just the

1 highly technical nature of this document. This is not the
2 type of document that a lawyer is really going to be able to
3 provide any legal advice regarding.

4 And all the cases cited by Rimini are really
5 inapposite because they're things like draft press releases or
6 draft 10-Ks that lawyers can provide comments and make
7 substantive edits about.

8 And I think there's no authority that this type
9 of technical specification for a software engineer, that the
10 changes made in the comparison are legal advice, and I think
11 they make zero showing that they are.

12 THE COURT: Well, let me ask you this. The
13 comparison detail doesn't label which one is the draft and
14 which one is the final.

15 MS. SMITH: So I believe the declaration
16 includes that detail, and that the comparison on the left --

17 THE COURT: Yeah.

18 MS. SMITH: -- is the draft, and the comparison
19 on the right is the final that Rimini appears to argue has
20 been edited by its in-house counsel.

21 THE COURT: Well, at least reviewed, right? Are
22 they saying that these are actual edits by lawyers on here?

23 MS. SMITH: It's unclear. They argue in their
24 opposition that the edits that were made certainly are --
25 could be legal advice so it's a little bit unclear, and they

1 don't make a specific representation about this particular
2 document.

3 THE COURT: Okay. I'm going to leave this one
4 up. Maybe I can talk about it with Mr. Vandevelde so we've --
5 is that it on the Dev Instructions?

6 MS. SMITH: I have a couple of more points to
7 make your Honor, if that's okay.

8 THE COURT: Sure.

9 MS. SMITH: Okay. One of the important points
10 in the Barbara Frederiksen-Cross report that is undisputed is
11 that she identifies in the draft that there is Oracle code in
12 the draft, and in the final that that's removed, and that was
13 undisputed.

14 So the larger context of this privilege argument
15 is that Rimini has developed a system to place these drafts in
16 a legal folder in a way that really attempts to hide what's
17 already been a violation of the injunction because they're not
18 allowed to use Oracle code in developing a Dev Instruction or
19 in their development process, and that just can't be. You
20 can't use the attorney-client privilege to shield discovery
21 from a violation of the injunction.

22 And this is just the one example that we have
23 because it was produced to us, and we believe that, you know,
24 if allowed discovery, you know, the chances of there being
25 more, there's a high likelihood of that.

1 THE COURT: How many Dev Instructions have been
2 produced?

3 MS. SMITH: So they produced the drafts that
4 ended up, for some reason, going to clients, and I don't have
5 an exact number. I think it's around a hundred.

6 So for those they produced drafts and finals,
7 and we can't always match those up, they haven't represented
8 how many they're withholding. There's no privilege log --

9 THE COURT: Okay. Well, how many in the final
10 version that went to clients have you gotten roughly?

11 MS. SMITH: I don't know, but I think a lot.

12 THE COURT: Ten thousand? No, I'm kidding.

13 | Okay.

14 MS. SHINN: No, your Honor. We have received
15 approximately 500 copies of Dev Instructions.

16 THE COURT: Five hundred.

17 MS. SHINN: Although some of those are
18 duplicates it appears.

19 THE COURT: And that also includes some of the
20 drafts that got sent to clients by mistake.

21 MS. SHINN: Yes.

22 THE COURT: Maybe by mistake, or got sent to
23 clients. Okay. I got that.

24 MS. SMITH: Two more points, your Honor.

25 THE COURT: All right.

1 MS. SMITH: The last one is that if you look at
2 the edits that were made to the final in the comparison,
3 they're not legal advice.

4 THE COURT: Okay.

5 MS. SMITH: They're not substantive edits we
6 would submit.

7 And the final point I'll make is that virtually
8 all of Rimini's development processes with respect to Oracle
9 products implicate the injunction.

10 And so if you -- if Oracle wins -- excuse me, if
11 Rimini wins in this argument that because they placed these
12 drafts in a review folder, even though they have this ongoing
13 business purpose, they'll be able to shield their entire
14 development process from discovery for compliance with the
15 injunction, and that is wholly inconsistent with all the case
16 law that requires an individualized showing with respect to
17 each communication that meets the elements that its primary
18 purpose is for legal advice that they're maintained
19 confidential, and it just hasn't been done here.

20 THE COURT: Got it.

21 MS. SMITH: Thank you, your Honor.

22 THE COURT: Thank you, Ms. Smith.

23 Mr. Vandevelde.

24 MR. VANDEVELDE: So, I want to be crystal clear
25 on what we've produced just so that there's no confusion.

1 We have produced and we are not claiming
2 privilege over, nor are we claiming they're irrelevant, any
3 Dev Instruction that was approved by Rimini legal that came
4 out of this process.

5 THE COURT: Okay.

6 MR. VANDEVELDE: So, as Ms. Shinn said,
7 something around 500. Maybe there's some duplicates though.

8 We are also not claiming privilege over any Dev
9 Instruction that was used with a client. So this Dev
10 Instruction that your Honor was looking at that Ms. Smith was
11 referring to, it may be labeled draft, but we produced it
12 because it was sent to a client.

13 THE COURT: Okay.

14 MR. VANDEVELDE: The narrower situation that
15 we're dealing with in this motion are draft Dev Instructions
16 that have never come out of the legal process and have never
17 been sent to or used with a client.

18 THE COURT: So even though -- so you're saying
19 these are -- in the process of apparently, you know, the
20 instruction gets drafted, it gets sent to this legal review
21 file, and if it came out of legal review --

22 MR. VANDEVELDE: Oracle has it.

23 THE COURT: -- Oracle has it.

24 MR. VANDEVELDE: Yep.

25 THE COURT: And they have -- they have the

1 drafts, too.

2 MR. VANDEVELDE: No, those are privileged.

3 THE COURT: Okay.

4 MR. VANDEVELDE: They have the final. But if a
5 draft was sent, even if it didn't come out of final, if it was
6 sent to a client or used with a client, then we produced it.

7 THE COURT: Okay.

8 MR. VANDEVELDE: And that's why we have this
9 example that your Honor was looking at.

10 This was one where we determined that even
11 though it was still labeled draft, it was sent to a client --

12 THE COURT: Right.

13 MR. VANDEVELDE: -- and so we produced it.

14 THE COURT: Right.

15 MR. VANDEVELDE: The only thing we're talking
16 about here is a set of draft instructions that have never come
17 out of the legal review process and have never been used or
18 transferred to a client.

19 THE COURT: Right, but there may be an
20 instruction that was derivative from that draft instruction?
21 That's what I'm trying to understand. The term draft
22 instruction is kind of confusing me.

23 So let's just suppose, you know, you have
24 customer A and you have customer B, and so two draft
25 instructions go into legal, one for A and one for B, both --

1 one of them goes through all the way through the process and
2 gets sent to customer A, but B, for some reason, it never
3 comes out.

4 All right. So for A, have you produced
5 everything in the A stream? Is that what you're telling me?

6 MR. VANDEVELDE: Yeah, and I'm glad you asked
7 that question because it actually works a little bit
8 differently, right?

9 So imagine we have clients A, B and C.

10 THE COURT: Right.

11 MR. VANDEVELDE: And Rimini has determined that
12 there's a -- not a problem, but some issue that needs -- that
13 requires an update to be implemented in all three
14 environments, client A, client B, client C.

15 Now, those environments could be different, they
16 could have different versions of the software, they could have
17 different customizations.

18 THE COURT: Okay.

19 MR. VANDEVELDE: But when a Rimini developer
20 remotely connects to client A, and basically figures out how
21 to solve the problem for client A, a Dev Instruction, which is
22 kind of like guidance of how to solve that problem, can be
23 created.

24 Now, there's a -- Rimini has a policy and a
25 rule, don't include Oracle code in these draft Dev

1 Instructions, but certainly Rimini is allowed to learn, right?
2 Allowed to solve problems and remember how it solves the
3 problems. So a Dev Instruction is essentially a
4 memorialization of how Rimini engineers solved the problem for
5 client A.

6 THE COURT: Okay.

7 MR. VANDEVELDE: Now, that Dev Instruction can
8 then be used -- it's Rimini's knowledge, it's their know-how,
9 it's their experience. It can be used to solve the similar
10 problem for client B, maybe in a different way, but it is
11 guidance, right?

12 THE COURT: Right.

13 MR. VANDEVELDE: So in your example, there's not
14 a Dev Instruction for client A and then a Dev -- you know, a
15 separate one for client B. There is a Dev Instruction that is
16 a memorialization of Rimini's know-how that is then used to
17 solve the same issue for multiple clients.

18 THE COURT: Okay.

19 MR. VANDEVELDE: And it does not contain Oracle
20 IP, that's the policy. So --

21 THE COURT: Now, is the purpose of the attorney
22 check to make sure that the policy is being followed? Is
23 that --

24 MR. VANDEVELDE: Yeah, that's part of the -- I
25 mean, look, Rimini has been (inaudible) with Oracle for ten

1 years.

2 THE COURT: Right.

3 MR. VANDEVELDE: There is -- almost ten years.
4 There is an injunction. The legal review process was created
5 before discovery reopened in this case, if I have my timing
6 right. The lawyer who reviews it is a senior counsel at
7 Rimini, she reads code, she has a technical background.

8 THE COURT: Right.

9 MR. VANDEVELDE: And she applies her technical
10 background plus her legal skills to analyze whether any of the
11 draft Dev Instructions placed in the For Legal Review folder
12 may implicate injunction issues.

13 THE COURT: Right.

14 MR. VANDEVELDE: This is the paradigmatic
15 example of someone, an engineer in this case, communicating
16 something to a counsel, Ms. Mendillo in this case, or any
17 other IP counsel at Rimini, who then provides legal advice
18 about whether it implicates any legal issues with respect to
19 the injunction or any other compliance issue.

20 THE COURT: Right.

21 MR. VANDEVELDE: I don't see this -- I mean,
22 just as a hypothetical, I mean, if I'm an executive at a
23 company, and some event has happened, and I e-mail my GC at
24 eleven o'clock at night and say, "We need to put out a
25 statement. Here's a draft statement." And it's about the

1 facts of that event and the company's take on that event, that
2 communication to the GC is privileged, I mean, there's no
3 dispute about that.

4 When a developer creates a draft Dev
5 Instruction, that is the communication. It doesn't matter
6 that it's code, the communication is the provision of it to
7 counsel. It's the reason why I'm going to counsel.

8 I'm going to counsel. I'm going to Ms. Mendillo
9 or other counsel at Rimini and saying, "Please look at this
10 code and tell me your legal opinion about whether or not this
11 implicates injunction issues or other compliance issues."

12 This is the archetypical example of a client, in
13 this case a developer, seeking legal advice from counsel.

14 And this is not a situation -- I'm sure your
15 Honor is very aware of situations where sometimes there's a
16 gray area, is the counsel -- in-house counsel wearing a
17 business hat or their legal hat. This is not that situation.
18 They're wearing their pure legal hat evaluating the draft Dev
19 Instruction for injunction compliance issues.

20 And I'll just finish by saying imagine if
21 developers could not consult with counsel about these issues,
22 I mean, think of the chilling effect. I mean, they would kind
23 of operate in the dark.

24 We want to foster, and Rimini has a culture of
25 compliance and encourages its employees to ask questions of

1 legal if there are any gray areas or questions they have.

2 This is the developers doing what they should be
3 doing, what the policy behind the attorney-client privilege
4 contemplates, right? It's what it's designed for, that is the
5 very purpose of the attorney-client privilege.

6 And, again, Oracle has all final Dev
7 Instructions, and any Dev Instruction, even if labeled draft
8 that was sent to a client, the only ones at issue are the ones
9 that have gone into that process and have never come out.

10 THE COURT: Never come out in that form. They
11 might have come out in a revised form --

12 MR. VANDEVELDE: Exactly.

13 THE COURT: -- where the lawyer might have said,
14 "Wait, you're getting too close to the injunction here," or
15 something, in theory.

16 MR. VANDEVELDE: Exactly, exactly. And that
17 advice, whether provided in the context of the document or
18 external conversations over the telephone or in person, that
19 is legal advice.

20 And you want developers to be able to go to
21 their lawyer and say, "Do you see any issues with this? I
22 know we're under an injunction, I'm not a lawyer, I don't
23 understand the injunction as well as you do, please identify
24 any legal issues you see." That is what is happening here.

25 THE COURT: So, really, that is your position,

1 you shouldn't have to produce them because it's privileged.

2 MR. VANDEVELDE: Yes.

3 THE COURT: That's the position. I got it. I
4 understand your position.

5 MR. VANDEVELDE: I'll just say, too, they're
6 also not relevant because they've never been sent or used with
7 a client, right, so they don't reflect what's
8 actually happened.

9 THE COURT: Okay. So you view that relevance,
10 too, but it sounds like privilege is the main --

11 MR. VANDEVELDE: Yeah.

12 THE COURT: Okay. Got it.

13 MR. VANDEVELDE: Thanks, your Honor.

14 THE COURT: Thank you.

15 MS. SMITH: The first thing I'd say, your Honor,
16 is that the injunction is not limited to development by
17 Rimini -- only development that was sent to clients.

18 THE COURT: Right. But how does this work from
19 a practical point of view? I mean, you know, this is an
20 organization, they send out all kinds of instructions, don't
21 look at code, don't do this, don't do that, you know, it's --
22 you know, but they want to set up a procedure to make sure at
23 the end of the day that they're not violating the injunction.

24 They've got a lawyer whose job it is -- who
25 apparently is some kind of computer person who understands

1 code and is going to look through there and make sure that the
2 client -- that the defendant, your client, is not violating
3 the injunction. Why isn't that attorney-client privilege?

4 MS. SMITH: Because at the point at which
5 they've showed the lawyer the draft Dev Instruction, the deed
6 has already been done. They've already violated the
7 injunction because they admit, your Honor, that they're
8 looking at Oracle code. They're viewing it to create the Dev
9 Instruction for the sole purpose of using it with other
10 customers, and that's cross-use.

11 So what Mr. Vandevelde described as a
12 memorialization of the update with third parties, that's
13 cross-use. That's prohibited.

14 So putting the lawyer in the middle after the
15 injunction has already been violated does not create a privilege
16 over those documents as to how they developed it, and I'll
17 tell you why, because in the original draft Dev Instruction,
18 if they put Oracle code in there, or they've used Oracle code
19 in there, and then in the final version they can still
20 maintain those instructions that use the Oracle code but they
21 sanitize it by hiding the evidence that they actually copied
22 Oracle code to do that. And you can't use the privilege to
23 hide conduct that violates the injunction by putting the
24 lawyer in the middle.

25 So the way to avoid this, if they got attorney

1 advice before they start drafting the Dev Instruction, can we
2 look at Oracle code while we're creating this instruction to
3 cross use it? The advice must be no.

4 But that's not what we're talking about here.
5 We're talking about a business document that's always existed
6 that they've now just put in this middle folder, and they want
7 to claim privilege over it.

8 THE COURT: So apparently you already have that
9 they're using Oracle code so what's the point?

10 MS. SMITH: In one example, because we don't
11 have all of them.

12 THE COURT: All right.

13 MS. SMITH: So it's evidence that they're using
14 this legal process to hide violations of the injunction.

15 THE COURT: Anything else?

16 MS. SMITH: One more point, your Honor.

17 Mr. Vandevelde stated that the input by the
18 lawyers were pure legal advice. We have no evidence of that.
19 The lawyer declaration doesn't say that. There's no privilege
20 log. There's no redactions. We have no way to test that.
21 There's no evidence in the record of that.

22 So I would just submit that they failed to meet
23 their burden as the party asserting the privilege as to
24 particularized privilege as to each of the documents.

25 How many there are, we don't know, but they

1 haven't met their burden.

2 THE COURT: All right. Okay. Well, I don't
3 know, this is a little bit harder one.

4 But it seems like to me, you know, assuming
5 everything really from your point of view, from Oracle's point
6 of view, that what Rimini is doing is taking steps to comply
7 with the injunction, and they're using lawyers to do that, and
8 it seems that if I were to order they've got to produce all
9 that now, that that's -- I don't know, it just doesn't seem
10 right to me.

11 You can make a record if you want in a minute.
12 Let me finish ruling, okay?

13 So I find that the claim of attorney-client
14 privilege in this set circumstance where there's a draft of a
15 Dev Instruction to deal with a situation, and that they have
16 taken an extra step to make sure they're not violating the
17 injunction when they go ahead and send it off to the
18 customers, that that's an appropriate attorney-client
19 interaction.

20 It is a communication to an attorney for advice.
21 And so those draft Dev Instructions, as long as they weren't
22 sent out to anybody beyond the copy, will not be produced.

23 Now -- or what was I going to say? You know, if
24 it -- you've got the one example, you know, you can argue from
25 that, but I just don't think it's appropriate -- you know, I

1 think it is appropriate to protect the attorney-client
2 privilege in this situation. So the motion to compel the
3 draft Dev Instructions is denied.

4 Okay. Go ahead and make your record.

5 MS. SMITH: Your Honor, I just wanted to inquire
6 whether the Court would consider ordering Rimini to produce a
7 privilege log or redaction of the alleged privilege
8 communications so we can assess claim because right now it's
9 just --

10 THE COURT: No, I understand.

11 MS. SMITH: -- a blanket objection.

12 THE COURT: I'm glad you asked me that because
13 that's where I was going to go.

14 No, because I think the point here is that when
15 the engineers send the draft to the lawyer, that whole thing
16 is -- that's the communication from the client to the attorney
17 to get legal advice. So to me the whole draft is a privileged
18 communication, and, you know, it's part of the process so a
19 redaction doesn't make any sense. I think that's what the
20 record establishes.

21 Okay. What have we got left here?

22 MR. VANDEVELDE: That's it from our perspective,
23 your Honor.

24 THE COURT: Was that it? All righty.

25 Okay, good. So the next thing, I guess, is the

1 expert discovery. Do we need to set -- the spoliation,
2 Mr. Pocker, you're saying there may be a spoliation motion
3 brought? Shall we talk about the timing of that so we don't
4 hold things up or whatever?

5 MR. POCKER: I think it's premature to discuss
6 specific timing because, as the Court knows, it could come up
7 at the tail-end of the discovery period, or it could be
8 something that impacts the actual trial.

9 THE COURT: Right, and maybe that's something I
10 can just say, it might help to make things more efficient.

11 You know, I get the spoliation motions, and, you
12 know, they're difficult for a magistrate judge because I'm not
13 going to be holding the hearing or the trial or whatever, and
14 it's really up to the presiding officer at the trial to decide
15 as the evidence comes in what's the appropriate, you know,
16 remedy, especially under these electronic -- you know, when
17 they revised the rule on that and they set up, you know, kind
18 of higher standards and then sort of a sliding scale of
19 remedies, very difficult, you know, in advance of the actual
20 hearing or trial for a magistrate judge to say what's
21 appropriate.

22 And so you might want to just consider maybe --
23 I don't know if you're going to have any kind of conference
24 with Judge Hicks about, you know, witnesses and documents and
25 exhibits and whatnot. You might just see if he would be

1 willing to take that spoliation motion. If not, I will, of
2 course -- if you coerce me to do it, I'll do it, but I just
3 think it's a probably more efficient way to handle something
4 like that.

5 MR. POCKER: Well, your Honor, the spoliation
6 issue earlier in this case --

7 THE COURT: Right.

8 MR. POCKER: -- was before Magistrate Judge
9 Leen, but, again, that was in the context of a jury trial so
10 the remedy is different.

11 THE COURT: Maybe so, but, you know, and that
12 was probably well before the changes to the rule, too.

13 MR. POCKER: Well, this case has been here a
14 long time.

15 THE COURT: Yeah. Because, you know, that's
16 very tempting when you get into it.

17 I had one where I -- actually, it was a jury
18 trial in front of me so it made it easier, and, you know,
19 there was a dispute about -- you know, because the phone
20 disappeared and the messages were on different AVI, and this
21 and that, and all these codes, and at the end the day it just
22 seemed better -- I said, you know what, we'll let the jury
23 decide if somebody monkeyed with the voice recording or not,
24 and, guess what, the voice recordings didn't come into
25 evidence so -- you know, that's kind of -- I think a pretty

1 smart thing that the rules people did to try and, you know,
2 not foreclose the actual trier of fact from getting into those
3 issues if it makes sense. Sometimes it does.

4 Anyway. Okay. Thank you very much.

5 MR. POCKER: Thank you, your Honor.

6 MS. SHINN: Thank you, your Honor.

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9 I certify that the foregoing is a correct
10 transcript from the record of proceedings
in the above-entitled matter.

11 /s/Margaret E. Griener 2/10/2020
12 Margaret E. Griener, CCR #3, FCRR
Official Reporter

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